SUPREME COURT, U. S.
FILED
JAN 30 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 1015

IN THE INTEREST OF T. W. P.

Petitioner.

PETITION FOR WRIT OF CERTIORARI
to
THE SUPREME COURT OF FLORIDA
and
THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

TOBIAS SIMON and ALFRED I. HOPKINS
Counsel for Petitioner
228 N. E. 1st Street
Miami, Florida

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
I. The Denial of Due Process	4
II. The Denial of Equal Protection	7
III. The Relevance of *In Re Gault*	8
IV. The Issue of Mootness	8
V. Summation	14
Conclusion	15
Appendix	App. 1

TABLE OF CASES

	Page
Application of Johnson, 178 F. Supp. 155 (U.S.D.C., N.J. 1957)	6
Dooling v. Overholser, 243 F.2d 825 (C.A.D.C., 1957)	6
Fiswick v. U. S., 329 U.S. 211, 91 L.Ed. 196, 67 S.Ct. 224 (1946)	13
Gideon v. Wainright, 372 U.S. 335; 9 L.Ed. 2d 799; 83 S.Ct. 792 (1963)	4
Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956)	8
In Re Carlo, 35 Law Week 2322 (N.J., 1966)	7
In Re Contreras, 241 P. 2d 631 (Cal., 1952)	7
In Re Gault, No. 116, October term, 1966	8
In Re Mantell, 62 N.W. 2d 308 (Neb., 1954)	6
In Re Poff, 135 F.Supp. 224 (U.S.D.C., D.C. 1955)	5
In Re Poulin, 129 A.2d 672 (N.H., 1957)	5
Jones v. Cunningham, 371 U.S. 236, 9 L.Ed. 2d 285, 83 S.Ct. 373 (1963)	13
Kent v. United States, 383 U.S. 541, 16 L.Ed. 2d 84 (1966)	7

TABLE OF CASES (cont.)

	Page
Lane v. Brown, 372 U.S. 477, 9 L.Ed. 2d 892, 83 S.Ct. 768 (1963)	8
Liner v. Jafco, 375 U.S. 301, 11 L.Ed. 2d 347, 84 S.Ct. 391 (1964)	12
Long v. District Court, No. 77, Oct. Term 1966, 35 Law Week 4046	8
People v. James, 211 N.Y.S. 2d 170 (N.Y. 1961)	5
Pollard v. United States, 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 (1957)	13
Shioutaken v. District of Columbia, 236 F.2d 666 (D.C. App. 1956)	5
Singleton v. Board of Commissioners of State Institutions, 356 F.2d 771 (5th C.A., 1966)	9
Smith v. Bennett, 365 U.S. 708, 6 L.Ed. 2d 39, 81 S.Ct. 895 (1963)	6
State v. Dennis, 185 So.2d 12 (Fla., 1966)	10
State v. Franklin, 12 So.2d 211 (La., 1943)	6
State v. Naylor, 207 A. 2d 1 (Del., 1965)	5
Trimble v. Stone, 187 F.Supp. 483, (U.S.D.C., D.C. 1960)	5

TABLE OF CASES (cont.)

	Page
United States v. Dickerson, 168 F.Supp. 899 (U.S.D.C., D.C. 1958)	7
United States v. Morgan, 346 U.S. 502, 98 L.Ed. 248, 74 S.Ct. 247 (1954)	13
United States v. Morales, 233 F. Supp. 160 (U.S.D.C., Mont. 1964)	7
Walling v. Reuter, 321 U.S. 671, 88 L.Ed. 1001, 64 S.Ct. 826 (1944)	14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No._____

IN THE INTEREST OF T. W. P.

Petitioner.

PETITION FOR WRIT OF CERTIORARI to THE SUPREME COURT OF FLORIDA and THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgments of the Supreme Court of Florida and the District Court of Appeal of Florida, Third District, entered in the above-styled cause on March 29, 1966 and December 7, 1966, respectively.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court of Appeal is reported in 184 So.2d 507. The opinion of the Supreme Court of Florida is reported in 192 So.2d 482.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), in that a right is claimed under the 14th Amendment to the Constitution of the United States.

Following the rendition of the decision of the District Court of Appeal on March 29, 1966, Petitioner, pursuant to Article V, Sec. 4(2) of the Florida Constitution, (3 Fla.Stats. 3801, 1965 Ed.) filed an appeal with the Supreme Court of Florida, which Court, in its opinion dated December 7, 1966, dismissed the appeal on the ground of mootness.

QUESTIONS PRESENTED

1. Where an indigent juvenile is charged before a juvenile court with the commission of felonious acts, adjudicated to be a delinquent, and sentenced to a state reform school for the balance of his minority, and where the court at the hearing failed to advise the indigent juvenile of his right to counsel or to appoint counsel on his behalf, was the juvenile thereby deprived of due process and equal protection under the 14th Amendment?

2. Where, pending his appeal before the Florida Supreme Court, the juvenile is released from reform school, does this Federal question thereupon become moot?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein are (1) the due process and equal protection clauses of the 14th Amendment; and (2) Flor-

ida Statutes, Chapter 39, which provides for the jurisdiction, powers and organization of the Florida juvenile courts, and relevant sections of which are set forth in the Appendix hereto. 1 Fla. Stats. 162 (1965 Ed.)

STATEMENT OF THE CASE

By Order dated July 21, 1965, the Juvenile and Domestic Relations Court in and for Dade County, Florida, held that Petitioner, being then 16 years old, broke and entered the linen room of a hotel, taking property and causing damage; took an automobile and drove it into another county without the owner's consent or knowledge; and took part in a strong arm robbery; and the Court ordered Petitioner committed to the Florida School for Boys for the period of his minority. At the hearing on these charges the trial court failed to advise Petitioner, an indigent, of his right to counsel, and failed to appoint counsel in his behalf. Although Petitioner did not request counsel at the time of the hearing, shortly thereafter counsel was obtained, without charge, through the American Civil Liberties Union, and an appeal was promptly taken to the District Court of Appeal, Third District of Florida. Thereafter, the District Court affirmed the judgment of the Juvenile Court, by decision rendered on March 29, 1966 (App. 1).

The federal question was first raised in Petitioner's Motion for Rehearing and in his application for bail before the Juvenile Court (Tr. D 8, 9-12). (For convenience, the transcript of proceedings before the District Court are designated herein as "Tr. D__", and those before the Supreme Court of Florida as "Tr. S__") The federal question was preserved in Petitioner's Assignments of Error

both in the District Court and in the Supreme Court of Florida. (Tr. D 13-15 and 23).

REASONS FOR GRANTING THE WRIT

I. The Denial of Due Process.

The District Court held that:

> " . . . there can be no question that a proceeding before the juvenile court is not a criminal proceeding, thus the constitutional and statutory rights given to persons charged with crime are not applicable to such proceedings. Nor has the legislature provided in the Act that a juvenile must be advised that he has a right to engage counsel or to have counsel named in his behalf, and our view of the act is that the legislature did not intend that a juvenile have this right in a juvenile court proceeding.
>
> "We therefore conclude that the proceedings in respect to appellant have been in compliance with statutory requirements and that the constitutional requirements guaranteed one accused of crime are not applicable." 184 So.2d 507, 510.

Petitioner submits that this ruling is in conflict with *Gideon* v. *Wainright*, 372 U.S. 335; 9 L.Ed. 2d 799; 83 S.Ct. 792 (1963), where the accused, an indigent, was sentenced to serve five years in the state prison for commission of a felony. Here Petitioner, charged with three acts which, had they been committed by an adult, would all have constituted felonies, was likewise sentenced to

serve five years in the Florida School for Boys, and subjected to deprivation of his liberty for a term equaling that imposed in *Gideon*. Accordingly, Petitioner submits that there is no legally significant difference in the issues presented here and in *Gideon*.

The decision of the District Court is also in conflict with rulings in other jurisdictions which have held that juvenile courts must comply with the requirements of due process. Thus, in *State* v. *Naylor*, 207 A. 2d 1 (Del., 1965) the court held that at a hearing on the question of transfer of jurisdiction from the juvenile court to the criminal court, "unless a juvenile has counsel at such a hearing he has been denied due process of law." 207 A. 2d 1, 11. Cf. *People* v. *James*, 211 N.Y.S. 2d 170 (N.Y., 1961); *In Re Poff*, 135 F. Supp. 224 (U.S.D.C., D.C. 1955); *In Re Poulin*, 129 A.2d 672 (N.H., 1957); *Shioutaken* v. *District of Columbia*, 236 F.2d 666 (D.C. App., 1956).

As Justice Holtzoff stated in *Trimble* v. *Stone*, 187 F.Supp. 483, 485 (U.S.D.C., D.C., 1960):

> "The fact that the proceedings are to be classified as civil instead of criminal, does not, however, necessarily lead to the conclusion that constitutional safeguards do not apply. . . . These proceedings have many ramifications which cannot be disposed of by denominating the proceedings as civil. . . . Basic human rights do not depend on nomenclature. . . .
>
> "Manifestly the Bill of Rights applies to every individual within the territorial jurisdiction of

the United States, irrespective of age. The Constitution contains no age limits."

Indeed, even in strictly civil proceedings where a person's liberty is at stake, as in commitment proceedings for the allegedly insane, the guarantees of due process obtain, e.g., *Dooling v. Overholser*, 243 F.2d 825 (C.A.D.C., 1957), where the court held that the alleged incompetent was entitled to appointment of representation by either an attorney or a guardian ad litem. And compare *Smith* v. *Bennett*, 365 U.S. 708, 6 L. Ed. 2d 39, 81 S.Ct. 895 (1961), where the Court, in cases involving the rights of indigent prisoners in habeas corpus proceedings, stated that: "The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." 6 L.Ed. 2d 39, 42.

While the authorities are admittedly in conflict, a number of jurisdictions have expressly afforded due process guarantees to juveniles, e.g.:

(a) Right to notice of specific charges: *Application of Johnson*, 178 F. Supp. 155 (U.S. D.C., N.J. 1957)

(b) Right to bail: *Trimble* v. *Stone, supra; State* v. *Franklin*, 12 So.2d 211 (La., 1943)

(c) Right to cross-examine adverse witnesses: *People* v. *James, supra*, and *In Re Mantell*, 62 N.W. 2d 308 (Neb., 1954)

(d) Protection against double jeopardy:

United States v. *Dickerson*, 168 F. Supp. 899 (U.S.D.C., D.C., 1958)

(e) Protection against adjudication of delinquency founded upon incompetent hearsay evidence: *In Re Contreras*, 241 P. 2d 631 (Cal., 1952)

(f) Admissibility of juvenile's confession treated by the same standards of due process as obtain in traditional criminal proceedings: *United States v. Morales*, 233 F. Supp. 160 (U.S.D.C., Mont., 1964); *In Re Carlo*, 35 Law Week 2322 (N.J., 1966)

And this court only recently observed in *Kent* v. *United States*, 383 U.S. 541, 16 L.Ed. 2d 84, 98 (1966), that a hearing in juvenile court "must measure up to the essentials of due process and fair treatment."

II. The Denial of Equal Protection.

The common concept of the juvenile court as *parens patriae*, reviewed at length in *Kent*, *supra*, and the collateral concept that the proceedings therein are "non-adversary" in nature, are eroded by the very structure of the Florida Juvenile Court Act. *If the juvenile or his parents can afford counsel, then counsel may appear*, Fla. Stat., Sec. 39.09(1) App. 13, and thus turn the proceeding into a truly adversary contest, with responsive pleadings (Sec. 39.07) App. 13, compulsory process (Sec. 39.06(4) (App. 11), and application of the rules of evidence used in equity (Sec. 39.09(2)). (App. 13). The net effect of the statute and the decisions below is that only the rich man's son is

entitled to due process; the poor man's son is left to the mercies of parens patriae: The result, therefore, is an egregious denial of equal protection of the laws. As the Court said in *Griffin* v. *Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956):

> "In criminal trials a state can no more discriminate on account of poverty than on account of religion, race or color. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 100 L.Ed. 891, 898-899.

Accord: Smith v. *Bennett, supra; Lane* v. *Brown*, 372 U.S. 477, 9 L.Ed. 2d 892, 83 S.Ct. 768 (1963); and *Long* v. *District Court*, No. 77, Oct. Term 1966, 35 Law Week, 4046.

III. The Relevance of In Re Gault.

Petitioner notes that many of the substantive constitutional considerations involved herein have already been briefed at length and argued to the Court in *In Re Gault*, No. 116, October term, 1966. Notwithstanding the gamut of issues raised by *Gault*, it does not reach the "Gideon" issue posed herein, namely, the constitutional right of an indigent juvenile, charged with felonious offenses, to appointed counsel.

IV. The Issue of Mootness.

The Supreme Court of Florida held that:

> "no useful purpose would be served to adjudicate the merits of the appeal since a hearing de novo

> in the juvenile court, if granted, would not afford Appellant any greater relief that he enjoys under his release"

and that:

> "the juvenile proceedings herein are not criminal proceedings and no stigma attached to the Appellant growing out of such proceedings which would justify reaching back of the release and vitiating the adjudication in the juvenile court." (Tr. S 27; App. 7)

Petitioner submits that the case is not moot, that serious collateral consequences flow from his adjudication of delinquency, and that serious penalties and disabilities result therefrom.

First, Florida Statutes, Section 39.02(5) provides that:

> "When jurisdiction of any child shall have been obtained, the court shall retain jurisdiction, unless relinquished by order, until the child reaches twenty-one years of age. . . ."

No such order has been issued here, and therefore Petitioner remains subject to the continuing jurisdiction of the juvenile court. Cf. *Singleton* v. *Board of Commissioners of State Institutions*, 356 F. 2d 771, 774 (5th C.A., 1966). Moreover, Florida Statutes, Sec. 955.23 provides, that:

> "Such child shall, during the term for which he was originally sentenced to the Florida industrial

> school for boys, be also subject to the care and control of the board of commissioners of state institutions, and on their being satisfied at any time that the welfare of the child would be promoted by his return to the school, *they may order his return* and may enforce such order by application to the judge of any court having original criminal jurisdiction, or judge of the police or municipal court for a warrant for such purpose, which may be served by any officer authorized to serve criminal process." (Emphasis supplied)

Cf. *Singleton* v. *Board, supra.* Further, having once been adjudicated a delinquent, Petitioner may subsequently be arrested and detained indefinitely, without a hearing, and without any right whatsoever to habeas corpus, under the ruling of *State* v. *Dennis,* 185 So.2d 12 (Fla., 1966). There the court had before it Florida Statutes, Sec. 39.03(7), which provides that:

> "No child taken into custody *who has not been adjudicated to be a dependent or delinquent child* shall be detained in custody longer than two days, excluding Sundays and legal holidays, unless a special order so directing is made by the judge, finding that the release of the child would be inimical to the welfare of the child or of the public, stating the reasons for such finding. The reasons for such finding shall be reviewable by appeal or in habeas corpus proceedings." (Emphasis supplied)

Dennis had been adjudicated a delinquent on prior occasions and the court held that:

> "under the obvious wording of the statute, the juvenile judge was not required to have a hearing within two days to determine whether it would be inimical to the best interests of the community to release the minor"

and stated that:

> "once a minor is apprehended, who has previously been declared a delinquent [notwithstanding any subsequent discharge from probation or punishment], the juvenile court *may detain him without the hearing provided for* in Sec. 39.03 (7)" 185 So.2d 12, 13. (Emphasis supplied)

The court thereupon not only discharged the writ of habeas corpus, but further stated that in any hearing which the child might subsequently be afforded, there would be no right to bail, counsel, confrontation of witnesses, or cross-examination. 185 So.2d 12, 14.

Second, counsel for Petitioner have been advised by officers of the Dade County juvenile court that adjudications of juvenile delinquency by that court are made available to the armed forces, the Federal Bureau of Investigation, local police departments, and local criminal courts for pre-sentence investigation. Appended hereto is a letter (App. 17) from the Chief Probation Officer of the Criminal Court of Record of Dade County, dated December 27, 1966, advising Alfred Feinberg, Esq., of counsel to the undersigned attorneys for Petitioner, of this very practice, and as noted in the letter, the juvenile court judge is given authority to release such information pursuant to Florida Statutes, Sec. 39.12(3). (App. 15)

Third, one can neither minimize nor deny the stigma generated by an adjudication of juvenile delinquency, for in future, when Petitioner applies for employment or further educational opportunities, the inevitable inquiries will be made and he will be forever cursed by his record of imprisonment in reform school and by a judicial finding, rendered without due process of law, that he committed three serious felonious offenses. Unless this Court grants relief, he will be branded for life. See Polow, J.: "The Juvenile Court: Effective Justice or Benevolent Despotism", 53 ABA Journal 31, 32 (January, 1967).

Fourth, if this case be moot, then all efforts in future at obtaining a ruling on the core issue of this case will be frustrated. As the Fifth Circuit noted in *Singleton*, *supra*, where plaintiff sought to desegregate the Florida State School for Boys:

> "The plaintiffs point out the practical difficulty of ever getting a decision on the merits if present incarceration is a prerequisite, since at none of the Florida schools is the average sojourn of an inmate as long as the one year (and more) that often elapses between the filing of a complaint and the issuance of an order in the average desegregation suit." 356 F.2d 771, 774, (Fn. 4).

This Court, of course, is not bound by a state court ruling of mootness on a substantial question of federal law. *Liner* v. *Jafco*, 375 U.S. 301, 11 L.Ed. 2d 347, 84 S.Ct. 391 (1964). And paraphrasing *Liner*, the federal issues here remain of operative importance to the parties, and the decisions of the Florida courts, if left undisturbed,

would frustrate the federal policy dominated by the sweep of the Fourteenth Amendment.

Accordingly, this Court has repeatedly held that release from incarceration does not *ipso facto* generate mootness. In *Fiswick v. U. S.*, 329 U.S. 211, 91 L.Ed. 196, 67 S.Ct. 224 (1946) the Court found that "further penalties or disabilities" could be imposed upon the petitioner as a result of a judgment which had been satisfied, e.g., deportation, difficulty or impossibility of obtaining naturalization, and loss of civil rights. In *United States* v. *Morstates*, 352 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 (1957) Court concluded that: "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." 98 L.Ed. 247, 257. Again in *Pollard* v. *United States*, 253 U.S. 354, 1 L.Ed. 2d 393, 77 S.Ct. 481 (1957) the Court disposed of the issue of mootness on the basis of *Morgan* and *Fiswick*, *supra*, and stated that "those cases recognize that convictions may entail collateral legal disadvantages in the future." 1 L.Ed. 2d 393, 397. And in *Jones* v. *Cunningham*, 371 U.S. 236, 9 L.Ed. 2d 285, 83 S.Ct. 373 (1963), where petitioner was subject to the continuing jurisdiction of the Virginia Parole Board, the Court noted that:

> "he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He can be rearrested at any time the Board or parole officer believes he has violated a term or condition of his parole, and he might be thrown back

in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime. It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." 9 L.Ed. 2d 285, 290-291.

Finally, as the Court stated in *Walling* v. *Reuter*, 321 U.S. 671, 88 L.Ed. 1001, 64 S.Ct. 826 (1944): "the principles [involving mootness] may be applied in fuller measure in furtherance of the public interest, which here the petitioner represents, than if only private interests were involved." 88 L.Ed. 1001, 1005.

V. Summation.

Petitioner submits that the issue at bar is as vital to the administration of justice in juvenile courts as *Gideon* has been for our criminal courts. The adjudication of juvenile delinquency, whether it be characterized as civil, criminal, or otherwise, in practical effect results in a deprivation of the child's liberty, confinement in a penal institution, severe psychological and psycho-sexual consequences, separation from parents, friends and all normal societal and cultural contacts, and a stigma which, like the mark of Cain, will be borne by him for the rest of his life. Petitioner submits that the cause is not moot and that in view of (1) this Court's pronouncement in *Gideon*, (2) the conflict of decisions among the various jurisdictions, and (3) the importance of the issue to the

administration of justice in juvenile courts throughout the country, this cause provides the essential predicate for the assumption of certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TOBIAS SIMON and
ALFRED I. HOPKINS
Counsel for Petitioner
223 N. E. 1st St.
Miami, Florida

By _____
Alfred I. Hopkins

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for a writ of certiorari has, pursuant to Rule 33 (1) of the Revised Rules of the Supreme Court of the United States, been served by mail upon the Honorable Earl Faircloth, Attorney General of the State of Florida, Tallahassee, Florida, by air mail this ____ day of _____, 1967.

_____
Alfred I. Hopkins